be judged likely or unlikely to influence the verdict. Thus, one who manufactured articles for a company with which a party was connected was held to be incompetent as a juror. *Laidlaw v. Sage,* 37 N. Y. Supp. 770. But the mere relation of debtor and creditor between a party and a juror does not disqualify the juror. *Thompson v. Douglass,* 35 W. Va. 337.

JURY—RIGHT TO JURY TRIAL—WAIVER OF JURY.—JENNINGS V. STATE, 114 N. W. 492 (WIS.)—*Held,* one pleading not guilty to an information charging felony or misdemeanor cannot, in the absence of a statute conferring the right, waive a jury, nor waive a right to trial by a common-law jury of twelve jurors. Marshall, J., *dissenting.*

At common law a jury was an essential part of any court which had jurisdiction to try persons charged by indictment and could not be waived. *Paulsen v. People,* 195 Ill. 507. While in civil cases the right to a jury trial is a mere privilege for the benefit of the litigants which may be waived, *Baird v. Mayor,* 74 N. Y. 382, in criminal cases the court is without jurisdiction in the absence of a jury, and jurisdiction cannot be conferred by consent. *State v. Maine,* 27 Conn. 281. In some States the rule does not apply to trials for misdemeanors. *State v. Alderton,* 50 W. Va. 101; *Levi v. State,* 4 Baxt. (Tenn.) 289. Consistently, when the jury trial cannot be waived it has been held that the common-law number of jurors cannot be waived. *Cancemi v. People,* 18 N. Y. 128; *State v. Mansfield,* 41 Mo. 470. *Contra, State v. Kaufman,* 51 Ia. 578; *Com. v. Dailey,* 12 Cush. (Mass.) 80. Some States by statute confer the right to waive. Such statutes have been held not in conflict with the State constitutions, *People v. Noll,* 20 Cal. 164; *State v. Abbee,* 61 N. H. 42; or with the Constitution of the United States, *Hallinger v. Davis,* 146 U. S. 314.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—CRAWFORD & MCCRIMMON CO. V. GOSE, 82 N. E. 984 (IND.).—*Held,* that in an action against an employer for injuries to an employee, the burden of proving contributory negligence rests on the employer.

In some jurisdictions the rule seems to be well settled that the burden is on the plaintiff to show by a preponderance of evidence that he was free from contributory negligence, *Connolly v. Waltham,* 156 Mass. 368, including ignorance of defects causing the injury, *Wiggins Ferry Co. v. Hill,* 112 Ill. App. 475; *Belair v. Chicago, etc., R. Co.,* 43 Iowa, 662; even when the action is brought under an employer's liability statute with no provisions on this particular point. *Taylor v. Carew Mfg. Co.,* 143 Mass. 470. Where all the circumstances attending the accident are in evidence, fair inference will take the place of positive evidence of plaintiff's due care. *Tyndale v. Old Colony R. Co.,* 156 Mass. 503; *Vorhees v. Hudson River Tel. Co.,* 109 N. Y. App. Div. 465. Still other jurisdictions hold that if the plaintiff proves the master negligent, he thus throws upon the defendant master the burden of showing contributory negligence. *Godfrey v. Beattyville Coal Co.,* 101 Ky. 339; *Johnston v. Richmond, etc., R. Co.,* 95 Ia. 685. But in the majority of the states contributory negligence is regarded as an affirmative defense which must be proved by the defendant. *Bonn v. Galveston, etc., R. Co.,* 82 S. W. 808 (Tex.); *Boweing v. Wilmington Malleable Iron Co.,* 66 Atl. 369 (Del.); *Northern Pac. R. Co. v. Tynan,* 119 Fed. 288; *Stewart v. Raleigh & A. Air Line R. Co.,* 53 S. E. 877, (N. C.). On the other hand, where contributory

negligence may be legitimately inferred from the plaintiff's own showing, defendant need not prove it. *New Omaha Thompson-Houston Electric Light Co. v. Dent,* 68 Neb. 668.

MASTER AND SERVANT—MASTER'S NEGLECT OF STATUTORY DUTY—EFFECT ON SERVANT'S ASSUMPTION OF RISK.—UNITED STATES CEMENT CO. V. COOPER, 82 N. E. 981 (IND.).—*Held,* that the doctrine of assumed risk does not apply where the negligence consists in violating the factory act (*Burns' Ann. St.* 1901, Section 7087), providing that machinery shall be guarded.

There is some conflict of authority as to whether a master may avail himself of the defense of assumption of risk where the injury complained of resulted from his neglect of a duty imposed by statute. Where the defense is forbidden by the statute itself, he cannot of course rely upon it, *Southern R. Co. v. Carson,* 194 U. S. 136, and where there is no such inhibition the weight of authority seems to be to the same effect, *Murphy v. Grand Rapids Veneer Works,* 106 N. W. 211 (Mich.); *Quackenbush v. Wisconsin, etc., R. Co.,* 62 Wisc. 411; *Denver & R. G. R. Co. v. Norgate,* 72 C. C. A. 365; even though the servant knew of the violation of the statute. The extreme case in this direction declares that assumption of risk would nullify the statute. *Narramore v. Cleveland, etc., R. Co.,* 96 Fed. 298. The contrary doctrine holds that knowledge of the violation of the statute constitutes a waiver of its terms and an assumption of risk. *Sweeney v. Central Pac. R. Co.,* 57 Cal. 15; *Spiva v. Osage Coal & Mining Co.,* 88 Mo. 68; *Kiernan v. Eidlitz,* 100 N. Y. Supp. 731. Between these extremes there are several cases holding that risk through the statutory negligence of the master is only assumed when the danger is so great that the facing of it amounts to contributory negligence. *Biles v. Seaboard Air Line R. Co.,* 139 N. C. 528; *Bair v. Heibel,* 103 Mo. App. 621. It is a settled rule, however, that if the object of the statute is other than the protection of the servant, *Fleming v. St. Paul, etc., R. Co.,* 27 Minn. 111, or if it is merely penal, *Knisley v. Pratt,* 148 N. Y. 372; *Nottage v. Sawmill Phœnix,* 133 Fed. 979, the master's neglect of the duty imposed will not prevent his relying on the servant's assumption of risk.

RAILROADS—CROSSING ACCIDENT—PROXIMATE CAUSE.—LOUISVILLE & N. R. CO. V. ARMSTRONG, 105 S. W. 473 (KY.).—*Held,* that where a team was frightened by the carcass of a horse lying on the defendant's right of way, near a road, the killing of the horse by one of the defendant's trains was not the proximate cause of the plaintiff's injuries resulting from the fright of the team.

In *Behling v. S. W. Penn. Pipe Lines,* 160 Pa. St. 359, a proximate cause is defined as one which in natural sequence, undisturbed by any independent cause, produces the result complained of. The negligent and unlawful leaving of any obstruction on or near the right of way and within the highway, although without the traveled portion, in such a manner as to frighten teams of ordinary docility, will make the company liable for damages resulting from such fright. *Pittsburgh, C. & St. L. R. Co. v. Kitley,* 118 Ind. 152; *Jones v. Housatonic R. Co.,* 107 Mass. 261; *Harrell v. Albemarle & P. R. R. Co.,* 110 N. C. 215; *Palys v. Jewett,* 32 N. J. Eq. 302. But, to recover, the *onus* of proving the negligence of the defendant rests upon the plaintiff. *Indianapolis & St. L. Ry. Co. v. Evans,* 88 Ill. 63. And he must show that the defendant knew, or by the use of ordinary care could have known, of the